MARK F. HAZELWOOD, # 136521
LAURA S. FLYNN, # 148511
LOW, BALL & LYNCH
505 Montgomery Street, 7th Floor
San Francisco, California 94111-2584
Telephone: (415) 981-6630
Facsimile: (415) 982-1634

Attorneys for Defendant
BAY AREA RAPID TRANSIT DISTRICT

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

PATRICIA NASH, Plaintiff, vs. BAY AREA RAPID TRANSIT DISTRICT, DOES 1- 40, Defendants.	NO. C 05 5307 VRW DEFENDANT BAY AREA RAPID TRANSIT DISTRICT'S NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT, OR IN THE ALTERNATIVE, PARTIAL SUMMARY JUDGMENT; MEMORANDUM OF POINTS AND AUTHORITIES Date: March 20, 2008 Time: 2:30 p.m. Courtroom: 6 - 17th Floor Honorable Vaughn R. Walker Trial Date: April 14, 2008

TO PLAINTIFF AND HER ATTORNEYS OF RECORD:

Notice is hereby given that on March 20, 2008 at 2:30 p.m., or as soon thereafter as counsel may be heard by the above entitled court, located at 450 Golden Gate Avenue in San Francisco, defendant Bay Area Rapid Transit District ("BART") will hereby move the court for summary judgment, or alternatively, partial summary judgment on the grounds that there is no genuine issue as to any material fact that moving party is entitled to judgment as a matter of law. Specifically, summary judgment is proper, pursuant to F.R.C.P. 56(b), because plaintiff cannot establish a violation of Title II of ADA or other related regulations. Further, the evidence shows that BART's system is safe for blind patrons and

that Ms. Nash cannot prevail on her State law claims.

This motion is based upon this notice of motion and motion, the accompanying memorandum of points and authorities, all supporting declarations and exhibits, all pleadings and papers on file in this action, and any other such matters as may be presented to the court at the time of this hearing.

Dated: February 14, 2008.

LOW, BALL & LYNCH

By _____
MARK F. HAZELWOOD
LAURA S. FLYNN
Attorneys for Defendant
BAY AREA RAPID TRANSIT DISTRICT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Page(s)

Cases (Cont'd.)

Page(s)

Cases (Cont'd.)

Statutes

Federal

Americans With Disabilities Act

49 CFR

Federal Rules of Civil Procedure

42 U.S.C.A.

State

California Civil Code

Page(s)

California Government Code

Other Authorities

MEMORANDUM OF POINTS AND AUTHORITIES

Defendant BAY AREA RAPID TRANSIT DISTRICT ("BART") submits the following memorandum of points and authorities in support of its Motion for Summary Judgment, or alternatively, Partial Summary Judgment.

I. INTRODUCTION

Plaintiff Patricia Nash, who is blind, fell between two BART cars while attempting to board a BART train. Ms. Nash has sued BART alleging Federal and State causes of action. Ms. Nash seeks personal injury damages, as well as injunctive relief. Specifically, Ms. Nash seeks to compel BART to add physical barriers to its cars and to supplement existing directional tiles on station platforms. Through this motion, BART requests that summary judgment be granted pursuant to F.R.C.P. 56(b). Specifically, BART asserts that plaintiff cannot establish a violation of Title II of ADA or other related regulations. Further, the evidence shows that BART's system is safe for blind patrons, and that Ms. Nash cannot prevail on her State claims.

II. BACKGROUND

A. The Accident.

Patricia Nash is a 57-year-old blind woman, who travels with the aid of a white cane. Ms. Nash has been blind since birth. Prior to the subject accident, Ms. Nash was a regular patron of BART. She had participated in several orientation and mobility training courses wherein blind people are trained to safely travel in public. From 1975 to 1982, plaintiff had traveled daily from Oakland to San Francisco on BART for work. (Exhibit A to Hazelwood Decl., Deposition of Patricia Nash, pp. 14:25-15:11; 20:2-7; 29:3-5). From 2001 up until the day of the accident, she would take BART four days a week. (Exhibit A to Hazelwood Decl., Deposition of Patricia Nash, pp. 46:24-47:2). Prior to the date of the subject accident, she had not had any accidents or problems, or incurred any injuries while using the BART system. (Exhibit A to Hazelwood Decl., Deposition of Patricia Nash, p. 48:8-15). If she was unfamiliar with the route she was taking, she would usually ask a BART Station Agent for assistance. (Exhibit A to Hazelwood Decl., Deposition of Patricia Nash, p. 54:3-16). If she was ever unsure about her positioning on a station platform, she would ask other passengers if she was in the proper position for boarding the train. (Exhibit A to Hazelwood Decl., Deposition of Patricia Nash, pp. 67:21-68:1.)

On the morning of August 19, 2004, plaintiff traveled from her home in the East Bay to San Francisco for a business appointment via BART. Plaintiff had no problems using BART to get to her appointment. (Exhibit A to Hazelwood Decl., Deposition of Patricia Nash, pp. 50:21-51:4.) Ms. Nash then returned to the 16th Station and Mission BART Station for her return trip home. At approximately 10:30 a.m., plaintiff was waiting for a train on the platform at the 16th Street and Mission station. Ms. Nash has testified at deposition that she cannot recall where she positioned herself. (Exhibit A to Hazelwood Decl., Deposition of Patricia Nash, p. 57:9-25). She did not ask a Station Agent for assistance. She did not ask any passengers whether she was in the proper position to board the train. Plaintiff heard a train pull into the station and walked to where she thought she perceived the opening to a door. (Exhibit A to Hazelwood Decl., Deposition of Patricia Nash, p. 68:14-15.) Ms. Nash would normally probe the area in front of her with a cane to determine if she was entering a car door. Plaintiff does not have a clear recollection of what she did immediately before the accident. Ms. Nash, however, did fall between the fourth and fifth cars of a ten-car train (Cars #439 and #2503). (Exhibit A to Hazelwood Decl., Deposition of Patricia Nash, pp. 71:3-76:14.) The next thing she remembers is standing up in the trackway and calling out, "Excuse me. Could somebody please help me?" She does not remember falling, finding the safe area underneath the platform, or the train leaving. (Exhibit A to Hazelwood Decl., Deposition of Patricia Nash, pp. 78:16-79:3; 80:16-18). Plaintiff was lifted from the track by other patrons. She suffered minor injuries.

The day after the accident, BART Safety Officer David Sanborn spoke to plaintiff on the phone. At that time, plaintiff stated that she had come down the stairs to the platform at the 16th Street Station as she had done in the past. She mentioned that she would usually talk to a Station Agent, but on this occasion did not. (Exhibit B to Hazelwood Decl., Deposition of David Sanborn, pp. 18:10-21, 20:6-19) While waiting at her normal spot for a train, she heard an announcement that said the next train was going to be a shorter, six-car train. She knew she needed to move further north in order to be able to board one of the trains. She repositioned herself, heard the train stop, and felt for the car doors with her cane using a sideswiping motion. (Exhibit B to Hazelwood Decl., Deposition of David Sanborn, p. 18:22-10) Ms. Nash admitted to Mr. Sanborn that she did *not* feel for the floor like she normally would. She stepped forward and fell into the gap between two cars. (Exhibit B to Hazelwood Decl., Deposition

of David Sanborn, pp. 19:11-13; 22:8-23:11.)

B. Procedural Background.

On November 22, 2005, plaintiff filed a complaint with the San Francisco Superior Court. The complaint sets forth the following causes of action: (1) Violation of Title II of the American with Disabilities Act ("ADA"); (2) Violation of the Unruh Act - Cal. Civil Code § 51; (3) Violation of Cal. Civil Code Section 54.1 - Failure to Prove Equal Access; (4) Failure to Discharge a Statutory Duty - Cal. Gov't Code § 815.6; (5) Dangerous Condition of Public Property - Cal. Gov't Code § 835; (6) Dangerous Condition Caused by Public Employee - Cal. Gov't Code § 840; (7) Strict Products Liability; and (8) Violation of Civil Code Sections 2100 and 2101.

The prayer of the complaint requests a permanent injunction against BART requiring it to install devices or systems to prevent, deter or warn individuals from inadvertently stepping off the platform between cars; a permanent injunction requiring BART to install detectable, directional textured material, fully conforming to the State Architect's regulations on its station platforms to help people who are blind find the doors to the cars; general damages; special damages; treble damages as allowed by law; attorney's fees; and costs of suit.

BART removed the case to the U.S. District Court - Northern District of California on December 22, 2005 and filed an answer to the complaint on December 27, 2005. Trial in this matter is scheduled to begin on April 14, 2008.

C. BART Transit Vehicles.

BART provides rail transit service covering the greater San Francisco Bay Area. BART passengers board the transit vehicles exclusively from high level platforms with the top of the platform at essentially the same height as the vehicle floor.

The BART system includes 43 stations and three types of revenue vehicles. There are 137 A-Cars, 303 B-Cars, 150 C-Cars and 80 C2-Cars in the 670-car fleet. A-Cars have a fiberglass operator's cab, automatic train operating equipment, and two-way communications system. B-Cars, located in the middle of the train, do not have a cab nor do they control the operation of the train. C-Cars are equipped with an operator's compartment, automatic train operating equipment and communications system, as in the A-Car, and can function as a lead, middle or trailing car. C2-Cars represent the third generation of

BART cars. The C2-Cars have flip-up seats and vertical handrails on every other seat. The flip-up seats, which are near each set of doors, were added to allow room for wheelchairs and customers with bicycles. Blinking red lights near the doors warn hearing-impaired riders that the doors are about to close. (Declaration of Richard Wieczorek, par. 3 and 4)

The number and kinds of cars that constitute a train vary, but an A-Car or C-Car must be at each end of the train to provide the necessary automatic control equipment. The smallest BART trains are three cars long, while the longest are ten. (Declaration of Richard Wieczorek, par. 3 and 4)

D. Solicitation and Procurement of C2-Cars.

When BART procures new transit vehicles, there is a complex and lengthy process. Initially, BART's in-house licensed engineers prepare specifications which can take six to twelve months to complete. The specifications are then sent to suppliers of transit vehicle equipment for comments and suggestions. The bid package is then sent to an outside engineering consulting firm for review. Phase 1 of the actual procurement involves a review of the bid package; review of technical specifications; contact with potential car builders; development of financing alternatives; and finalization of procurement documents. Phase 2 involves the request for proposals, aka the letting of bids; evaluation of the proposals for compliance with the requirements; ranking the proposals; determination of proposals that are in the competitive range; competitive discussions; refinement of requirements; best and final offer; evaluation of best and final offers; and the recommendation of award. (Declaration of Richard Wieczorek, par. 5)

Ms. Nash fell between a C1-Car (#439) and a C2-Car (#2503). (Declaration of Richard Wieczorek, par. 6) The C1-Cars were purchased in 1982. The cars were placed into service during 1988 and 1989. (Declaration of Henry Kolesar, par. 5) Work associated with the preparation of the specifications for the C2-Cars began in or about mid-1989. On February 12, 1990, BART's Assistant General Manager Jim Gallagher routed the C-2 car specifications for comment around the District. (Declaration of Richard Wieczorek, Exhibit A) In August of 1990, a copy of the related specifications was sent out for industry review to various car builders. (Declaration of Richard Wieczorek, Exhibit B)

In May of 1991, Booz Allen Hamilton began reviewing the bid package. Booz Allen Hamilton is a global engineering consulting firm which provides services to the transportation industry. The

estimated cost associated with the support provided by Booz Allen for negotiating the procurement was $225,804. (Declaration of Richard Wieczorek, Exhibit C.) In July 1991, meetings were held with potential car builders to discuss their capabilities, interest, etc. (Declaration of Richard Wieczorek, Exhibit D.)

The Contract Book - Technical Provisions for the Procurement of Transit Vehicles was completed in August 1991. (Declaration of Richard Wieczorek, Exhibit E.) Pursuant to a Notice to Suppliers Requesting Proposals, a solicitation for bids was advertised on August 1, 1991. (Declaration of Richard Wieczorek, Exhibit F.) The solicitation for bids stated that all work should be performed in accordance with the laws of the State of California. A pre-proposal conference was held on August 28, 1991 to explain the procurement and answer questions of parties interested in contracting for the work. The original proposal due date was October 1, 1991. Changes to the Contract Book were made on October 8, 1991, October 25, 1991, and November 18, 1991. (Declaration of Richard Wieczorek, Exhibit G .) The Contract Proposal due date was changed to December 10, 1991.

Proposals were received from three companies on December 10, 1991. Technical proposals were evaluated by a technical evaluation committee and price proposals were evaluated by a separate price evaluation committee. The evaluation of proposals was completed on December 30, 1991. (Declaration of Richard Wieczorek, Exhibit H - Executive Decision Document.) A Request for Best and Final Offer was issued on February 20, 1992. (Declaration of Richard Wieczorek, Exhibit I .) Best and Final Offers were received March 2, 1992 and technical and price evaluations were completed on the same day. (Declaration of Richard Wieczorek, Exhibit H - Executive Decision Document.) On March 17, 1992, the Board of Directors authorized the General Manager to award the Contract to Morrison Knudsen Corporation. (Declaration of Richard Wieczorek, Exhibit H and Exhibit J.) The Contract was executed on May 4, 1992. (Declaration of Richard Wieczorek, Exhibit K - San Francisco Bay Area Rapid Transit District Contract.)

E. Steps Taken by BART to Accommodate Visually Impaired Riders.

There are a number of features that make BART readily accessible to persons with disabilities including:

1. Textured yellow and black detection edge tiles along the length of BART train platforms

warn passengers that they are close to the platform edge. These tiles can be detected with a cane or foot. Yellow tiles run along the length of all BART platforms, and are 24 inches deep. Additional black rubber directional tiles are used to mark the approximate location of train doors when the train pulls into the station. These tiles are 12 inches deep and are located at the four main stop locations on each platform. (Declaration of Richard Wenzel, Exhibits A and B.)

2. Train Operators announce the name of the next station as well as instructions for transfers.

3. Service animals are permitted in BART stations and trains.

4. All stations have public and white courtesy phones at all levels that connect directly to the Station Agent.

5. All cars have designated priority seating near the doors for persons with disabilities.

6. Station Agents are trained and available to help persons with disabilities with elevator and escalator access, tickets, schedules, and other needs.

7. BART has an Accessibility Task Force that advises the BART Board of Directors and staff on disability related issues and advocates on behalf of people with disabilities to make the system accessible to people regardless of disability. All meetings are open to the public. The Force meets on the fourth Thursday of each month. Meeting materials are prepared electronically and in Braille for every meeting and are supplied upon request.

8. BART conducts orientation tours for patrons and groups of students from the California School for the Blind, the Orientation Center for the Blind, East Bay Skills Center and the Oakland School District. The participants receive familiarization training on the layout of a BART station, fare collection equipment, train operations at stations, revenue train layout and station wayside equipment, from BART's safety, station operations and train operations staff. (Declaration of Ikechukwu Nnaji, par. 3-8)

F. <u>Prior Incidents Involving Visually Impaired Patrons Falling Between Cars</u>.

BART keeps records of all reported accidents. BART statistics indicate that prior to plaintiff's accident, there had been only two reported incidents of visually impaired patrons falling through the in-between car gap in the seven prior years. During this time period, there had been over 600 million

BART riders. BART has no records indicating a person has ever been killed or seriously injured as the result of falling between cars from a station platform. (Declaration of David Sanborn, par. 3)

III. ARGUMENT

A. Standard of Review.

Summary judgment should be granted if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact the moving party is entitled to judgment as a matter of law." F.R.C.P. 56(c). It pierces the pleadings and puts the opponent to the test of affirmatively coming forward with sufficient evidence for its claims to create a genuine issue of fact for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In order to meet its initial burden, "the moving party must either produce evidence negating an essential element of the nonmoving party's claim or defense or show that the nonmoving party does not have enough evidence of an essential element to carry its ultimate burden of persuasion at trial." *Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Companies, Inc.*, (9th Cir. 2000) 210 F.3d 1099, 1102.

In opposing a motion for summary judgment, the adverse party "may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." F.R.C.P. 56(e). In the absence of such a response, "summary judgment, if appropriate, shall be entered against the adverse party." *Id.*

B. Plaintiff Cannot Establish a Violation of ADA and Related Regulations.

1. The C2-Cars Were Let out for Bid Prior to the Effective Date of the ADA.

Title II of the ADA provides that no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of services, programs, or activities of a public entity, or be subject to discrimination by an such entity. 42 U.S.C.A. Section 12132. To prove that a public program or service violates the ADA, plaintiff bears the burden of showing that she is a qualified individual with a disability; that she was excluded from participation in or denied benefits of a public entity's services, programs or activities; and that such discrimination was by reason of her disability. *Weinrich v. LA County Metropolitan Transportation Authority* (9th Cir. 1997) 114 F.3d 976, 978. When analyzing whether a violation has taken place, a court looks to the Federal standards for

accessibility for transportation vehicles., which are set forth in 49 CFR Part 37 and 38.

Plaintiff asserts that BART violated 42 U.S.C.A. 12142 and 49 CFR 37.79 in that it purchased a light rail vehicle after August of 1990 that was not readily accessible to and usable by individuals with disabilities. Plaintiff alleges that one of the BART cars that she fell between, C2-Car #2503, was manufactured in 1996 and that it was not accessible because it lacked a between-car barrier as required by 49 CFR 38.63[1] which states:

> Suitable devices or systems shall be provided to prevent, deter, or warn individuals from inadvertently stepping off the platform between cars. Acceptable solutions include, but are not limited to, pantograph gates, chains, motion detectors or similar devices.

Section 38.63 is not specific as to the type of system that is required to "prevent, deter, or warn." No published decision has set forth that there needs to be any one specific system. BART's system, through the use of edge tiles (and now directional tiles); training of staff to help visually impaired riders; and education of the blind community to use BART, has worked. There has been no history or pattern of between-car-barrier falls.

Even if this court considers plaintiff's arguments that BART is required to do something more, BART maintains that Title II does not apply to the two cars that plaintiff fell between.

In *Kinney v. Yerusalim*, (E.D. Pa. 1993) 812 F.Supp. 547, disabled individuals filed a class action against the Secretary of Pennsylvania Department of Transportation seeking to compel the city to install curb ramps on all streets that had been resurfaced since the effective date of the ADA. As part of its ruling on a summary judgment motion, the Court determined whether the City was obligated to install curb ramps on all streets on which the resurfacing was performed after January 26, 1992, the effective date of Title II of the ADA, or on only those streets wherein the resurfacing contracts were "bid" after that date. After evaluating the language of the relevant regulation, the Court held that the City's obligation to comply with ADA regulations relating to the installation of curb ramps applied only to those resurfacing contracts for which bids were let after the effective date of the ADA. *Id.* at 552-553.

---

[1]The other transit car plaintiff fell between was a C-Car which was manufactured in 1989. Plaintiff is not alleging a violation of the ADA in association with the #439 train car, as it was manufactured prior to the effective date of the ADA.

The Court noted that resurfacing can require significant planning by the City, including procurement of funds and the solicitation of bids. Therefore, the Court concluded that the obligations imposed by the regulation applied only to those contracts for which bids were let after January 26, 1992.

Title II of the ADA, the statute upon which plaintiff bases her claim for relief, became effective as of January 26, 1992. *Independent Housing Services of San Francisco v. Fillmore Center Associates* (N.D. 1993) 840 F.Supp.1328, 1343; *Norman-Bloodsaw v. Lawrence Berkeley Laboratory* (9th Cir. 1998) 135 F.3d 1260, 1273. BART does not dispute that Car #2503 was manufactured in 1996. However, the contract for the Car-2 cars (including Car # 2503) was sent out for bid in August of 1991. (Exhibit F to Dec. of Richard Wieczorak.) Prior to sending the Contract out for bid, BART underwent a lengthy and complex negotiated procurement process which included the following stages: preparation of specifications (six to twelve months), review and feedback relating to specifications (six to nine months); review of the bid package (two weeks); review of technical specifications (two weeks); contact with potential car builders (two weeks); development of financing alternatives (one month); and finalization of procurement documents (month and a half).

After the request for proposals, aka the letting of bids, a number of additional steps were taken: evaluation of the proposals for compliance with the requirements; ranking the proposals; determination of proposals that were in the competitive range; competitive discussions; refinement of requirements; best and final offers (BAFOs); evaluation of best and final offers; and a recommendation of award. The cost associated with support for the negotiated procurement was in the range of $225,804.

As indicated above, the contract for the C2 BART car was let out for bid in August of 1991, prior to the January 1992 effective date of Title II. The evidence establishes that the procurement process required significant planning and expense on BART's behalf. Based on these facts, Ms. Nash fell between two cars that are not subject to Title II and related regulations.

Further, the provisions of 49 C.F.R. parts 37 and 38, and in particular section 38.63 (relating to between-car-barriers), became effective October 7, 1991. By the date Part 38 became effective, BART had already put the C-2 contract out to bid (August 1, 1991) and set an original proposal due date (October 1, 1991). Consistent with the reasoning of the *Kinney* case, *supra*, BART should not be required to comply with the accessibility provisions of Part 38 on its C-2 cars after so much design work

had already gone into the project. The court should also not give retroactive effect to the ADA.

In *Raya v. Maryatt Industries* (N.D. Cal. 1993) 829 F.Supp. 1169, a plaintiff asserted an ADA claim based on alleged discrimination that took place prior to the effective date of the ADA. The court noted that the ADA would have to apply retroactively in order for the plaintiff to state a claim. The court then analyzed whether the ADA could be applied retroactively and determined that retroactive application of the ADA would not be appropriate. *Id.* at 1171-1175. See, also *Conway v. Standard Ins. Co.* (1998) 23 F.Supp.2d 1199, 1201.

In order to hold BART liable for violation of Title II of the ADA, plaintiff must show that BART was in violation of the ADA at some point after its effective date. Plaintiff cannot establish that BART solicited the purchase of the C2-cars after October 7, 1991 (as to section 38.63) or January 1992 (as to Title II). To hold BART liable for conduct occurring prior to these dates would be a retroactive application of its provisions and a violation of BART's right to Due Process. For all of these reasons, plaintiff cannot prevail on her claims of ADA discrimination in the first, second, and third causes of action.

C. Plaintiff Cannot Establish State Architect Regulations Apply to This Case.

1. State Architect Regulations Do Not Apply to 16th Street/Mission Station.

In plaintiff's third cause of action, Ms. Nash alleges through Cal. Civil Code §54.1 that BART failed to provide equal access by not having directional tiles in place on the platform at the 16th Street/Mission Station at the time of Ms. Nash's accident. The evidence shows that visually impaired riders have always enjoyed equal access on BART.

Cal. Civil Code Section 54.1 confers on disabled persons a right of full and equal access to places of public accommodation. Full and equal access for purposes of this section, in its application to transportation, means access that meets the standards of Title II of the ADA. A violation of the right of an individual under the ADA also constitutes a violation of Section 54.1.

The State of California does provide standards for accessibility, which are set forth in administrative regulations promulgated by the office of the State Architect. Title 24 of the California Code of Regulations addresses accessibility of buildings.

The Title 24 regulations implement Sections 4450 et seq. of the Government Code to ensure that

where State funds are utilized for the construction or alteration of any public building or facility, that the plans and specifications for such buildings and facilities are reviewed by the Division of the State Architect, and certified to be in compliance with the "Access to the Public Buildings by Physically Handicapped Persons Laws" prior to a contract being awarded. Title 24, Chapter 5, Article 1, section 5-101. The regulations adopted by the State Architect have prospective application after January 1, 1993. The bulk of the regulations set forth in Chapter 11B of Title 24 "Accessibility to Public Buildings, Public Accommodations, Commercial Buildings and Publicly Funded Housing" apply to new buildings, not *existing* buildings. The regulations relating to accessibility for existing buildings are set forth in Division IV, sections 1134B and 1135B. The subject regulation cited by plaintiff, section 1133.B.8.4,(see plaintiff's complaint, paragraph 31) is not contained within Division IV, which sets forth regulations for existing buildings and was not added to the Building Code until April of 1994.

The 16th Street & Mission Station was designed in 1970 and completed in 1972, prior to the enactment of regulation 1133.B.8.4. Since the Station was completed prior to the enactment of the regulation, the regulation does not apply as Title 24 regulations only apply to new construction or alterations. *Independent Housing Services, infra,* 840 F.Supp. at 1351. *Donald v. Sacramento Valley Bank* (1989) 209 Cal.App.3d 1183, 1192.

2. California State Architect Regulation 1133b.8.4 Does Not Provide a Basis for Liability.

Government Code section 4500(b) which relates to contracts for rapid transit equipment or structures; and ready access for individuals with disabilities, states:

> (b) Notwithstanding any other provision of law, public transit facilities and operation, whether operated by or under contract with a public entity, shall meet the applicable standards of Titles II and III of the federal Americans with Disabilities Act of 1990 (Public Law 101-336) and the federal regulations adopted pursuant thereto, subject to the exceptions provided in that act. However, if the laws of this state in effect as of December 31, 1992, prescribe higher standards than the Americans with Disabilities Act of 1990 (Public Law 101-336) and federal regulations adopted pursuant thereto, then those public transit facilities and operations shall meet the higher standards.

Plaintiff asserts that BART violated Gov't . Code section 4500(b) in that it is in violation of Section 1133B.8.4. of the California State Architect's regulations which calls for installation of

detectable directional texture at boarding platforms.[2] However, as indicated above, the subject regulation was not added to the Building Code until April of 1994. Therefore, this more stringent regulation is not applicable to BART because it was not in effect as of December 31, 1992. As a result, plaintiff cannot prevail on his claim that BART violated the regulation, and consequently, California Civil Code § 54.1.

3. Compliance with the California State Architectural Requirement Would Not Guarantee Accessibility.

Assuming that BART is required to comply with Cal. State Arch. Reg. 1133B.8.4, the Court should not require any related injunctive relief as such an order would not ensure accessibility for blind passengers and would result in BART violating an ADA Standard relating to wheelchair users.

Section 1133B.8.4 states:

> "At transit boarding platforms, the pedestrian access shall be identified with a detectable direction texture. The texture is to comply with Figure 11B-23B and shall be 0.1 inch in height that tapers off to 0.04 inch with bars raised 0.2 inch from the surface. The raised bars shall be 1.3 inches wide and 3 inches from center-to-center of each bar. This surface shall differ from adjoining walking surfaces in resiliency or sound on cane contact. The color of the directional texture shall comply with Section 1133B.8.3. This surface will be placed directly behind the yellow detectable warning texture specified in Section 1133B.8.3. aligning with all doors of the transit vehicles, where passengers will embark. The width of the directional texture shall be equal to the width of the transit vehicle's door opening. The depth of the texture shall not be less than 36 inches."

In this case, it is undisputed that BART now has directional tiles at the four main door stop locations in all 43 stations. Plaintiff, however, seeks to compel BART to install additional tiles at all possible door stop locations, and to have the tiles be 36 inches deep, not 12 inches deep.

BART installed the tiles at the 4 main door stop locations, in the center of the platform, because those are the only 4 locations that a train is guaranteed to stop at. Trains vary in size from 3 to 10 cars. If tiles were present all along the platform, a blind person could incorrectly assume a car door was present; when in the case of a short train, it may not be. This would be dangerous. (Declaration of Richard Wenzel, par. 5)

---

[2]The directional texture is to be used in conjunction with detectable texture which is designed to warn blind passengers when they are approaching the platform's edge. The directional texture is designed to guide blind passengers to the doors of the train.

In addition, BART is in the process of procuring additional transit vehicles that may not have the same number of doors per train and that may have door openings inconsistent with directional tiles that have been placed at various stations. (Declaration of Richard Wieczorek, par. 11) For this further reason, there is no basis to compel BART to revise the directional tile program.

In addition to adding directional tiles, plaintiff also seeks to compel BART to make the tiles 36 inches deep. BART has made the directional tiles 12 inches deep, so that a row of raised tiles do not extend too far into a platform area. Platform areas in certain stations, including 16th Street and Mission, are narrow. To require BART to extend the tiles farther back would result in BART violating an ADA and ABA Guideline Standard for Building and Facilities. For instance, there is limited clearance (57") between the platform wall and the edge of the directional tiles that currently exist at the 16th Street/Mission Station. (Declaration of Richard Wenzel, Exhibit B and C.) If BART had installed 36" of directional tiles, it would leave 21" from the edge of the directional tiles and the wall. ADA and ABA Guidelines require a minimum of 30" "clear floor" access for wheelchair users.[3] (Declaration of Richard Wenzel, Exhibit D) Therefore, people waiting on the platform, there would not be sufficient "clear floor" access as required. The Accessibility Guidelines state that in alterations, where compliance with the applicable requirements is technically infeasible, the alteration shall comply with the requirements to the maximum extent feasible. Section 202.3 - Exception 2. Section 202.3.1 - Prohibited Reduction in Access, states that an alteration that decreases or has the effect of decreasing the accessibility of a building or facility below the requirements for new construction at the time of the alteration is prohibited. (Declaration of Richard Wenzel, Exhibit E.)

Any order compelling BART to comply with the State Architect requirement would not ensure improved accessibility. As a result, plaintiff is not entitled to injunctive relief as to the installation of directional tiles.

[3]ADA Accessibility Guidelines section 305.3 states "Size. The clear floor or ground space shall be 30 inches (760 mm) minimum by 48 inches (1220 mm) minimum.

D. Plaintiff Cannot Establish That BART Has a Mandatory Duty to Install Barriers or Additional Tiles.

In her fourth cause of action, plaintiff asserts that BART has breached a mandatory duty, pursuant to Cal. Gov't Code §815.6. Plaintiff specifically claims that BART has a mandatory duty to install devices or systems to prevent, deter or warn individuals from inadvertently stepping off the platform between cars or their trains and to install detectable (directional tiles). (Plaintiff's complaint, par. 37).

Under section 815.6, a public entity may only be held liable for breach of a mandatory duty where: 1) plaintiff pleads a specific enactment which imposes a mandatory, not discretionary duty; 2) the enactment must be intended to protect against the kind of risk or injury suffered by plaintiff; and 3) the breach of a mandatory duty is the proximate cause of plaintiff's injury. Only when all of those elements are met, may a court issue on order to compel performance. Whether an enactment is intended to impose a mandatory duty is a question of interpretation for the court. *Haggis v. City of Los Angeles* (2000) 22 Cal.4th 490, 499.

It is anticipated that plaintiff will claim that 49 C.F.R. 38.63 and Title 24 of the Code of Regulations, Chapter 11(B), section 1133.B.8.4. create a mandatory duty. A statute is deemed to impose a mandatory duty on a public entity only if the statute affirmatively imposes the duty and provides implementing guidelines. *O'Toole v. Superior Court* (2006) 140 Cal.App.4th 488, 510. If a statute does not require that a particular action be taken, §815.6 does not create a right to sue a public entity.

Here, §38.63 does not set forth a specific way to "prevent, deter, or warn." There are no implementing guidelines. The statute is extremely vague. As set forth above, BART contends it has such a system. Regardless, the statute does not meet the criteria to establish a mandatory duty under §815.6. Similarly, section 1133.B.8.4. does not affirmatively impose a duty. (See Section III (B) above). For these reasons, plaintiff cannot meet all elements of §815.6 and partial summary judgment should be granted as to the fourth cause of action.

E. BART, a Public Entity, Cannot Be Held Liable For Strict Products Liability.

Except as otherwise provided by statute, a public entity "is not liable for an injury, whether that injury arises out of an act or omission of the public entity or a public employee or any person." Cal.

Govt. Code Section 815. Hence, except as required by the federal or state constitutions, liability must be based on a California statute. *Tolan v. State of California* (1979) 100 Cal.App.3d 980, 986-987. "Strict products liability is a unique, court-fashioned doctrine. . . Hence, strict products liability has no place in governmental tort law, directly or my analogy." *Id.*

A "public entity" as used in Government Code Section 815 is defined as including the state, the Regents of the University of California, a county, city, district, public agency and any other political subdivision or public corporation in California. Gov't Code Section 811.2.

BART is a public entity. There is no California statute which provides that a public entity can be held liable for strict products liability. As a result, there is no basis for holding BART liable pursuant to a cause of action for strict products liability. Therefore, partial summary judgment should be granted as to plaintiff's seventh cause of action.

F. Plaintiff Cannot Establish a Dangerous Condition of Public Property as the Cars Do Not Present a Substantial Risk of Injury When a Visually Impaired Person Exercises Due Care.

Plaintiff's fifth and sixth causes of action allege existence of a dangerous condition of public property, pursuant to the California Gov't Code. Except as provided by statute, a public entity is liable for injury caused by a dangerous condition of property if the plaintiff establishes that the property was in a dangerous condition at the time of the injury; that the injury was proximately caused by the dangerous condition; that the dangerous conditions created a reasonably foreseeable risk of the kind of injury which was incurred; and either 1) a negligent act of an employee of the public entity created the dangerous condition; or 2) the public entity had notice of the condition a sufficient time prior to the injury to have taken measures to protect against the dangerous condition. Cal. Govt. Code Section 835.

A "dangerous condition" means a condition of property that creates a substantial (as distinguished from a minor, trivial or insignificant) risk of injury when such property is used with due care in a manner in which it is reasonably foreseeable that it will be used. Cal. Govt. Code Section 830. Liability may ensue only if the property creates a substantial risk of injury when used by the general public with due care since any property can be dangerous if used in a sufficiently abnormal manner. *Milligan v. Golden Gate, Bridge, Highway and Transp. Dist.* (2004) 120 Cal.App.1, 6. Although it is the general rule that it is a factual question as to whether a given set of facts and circumstances creates a

dangerous condition, the issue may be resolved as a question of law if reasonable minds can come to but one conclusion. *Id.*

Here, plaintiff claims that the lack of physical barriers on train cars and/or the lack of directional tiles, at the time of the subject accident, constituted a dangerous condition. Ms. Nash, however, cannot establish all elements of §835.

First, plaintiff must prove that the station platform constituted a substantial risk to those using due care. *See Chowdhury v. City of Los Angeles* (1995) 38 Cal.App.4th 1187, 1197. Here, the evidence shows through Ms. Nash's admission to David Sanborn after the accident, that she did not perform her usual inspection with her cane to determine if she was entering a BART train door. This is the only reason the accident occurred.

Further, plaintiff cannot establish that BART had actual or constructive notice prior to the accident. As set forth above, there had been only two possibly similar between-car-barrier falls in the seven years before Ms. Nash's accident. During that time, there had been over 600 million riders on BART. There is no history or pattern giving BART notice of a problem. *See Compton v. City of Santee* (1993) 12 Cal.App.4th 519, 599; *Higgins v. State of California* (1997) 54 Cal. App.4th 177, 187. Because plaintiff cannot establish all elements of section 835, she cannot prevail on the fifth and sixth causes of action and summary judgment should be granted for these further reasons.

Further, plaintiff contends that the failure to have directional tiles pursuant to State Architect Regulations, constitutes a dangerous condition. As set forth above, the applicable regulation was created in 1994. The 16th Street & Mission station was completed in 1972. The fact that a design arguably does not conform to a new standard, does not establish the existence of a dangerous condition. *Thompson v. City of Glendale* (1976) 61 Cal.App.3d 378, 387; *Dole Citrus v. State* (1997) 60 Cal.App.4th 486, 493-494.

Finally, with regard to the sixth cause of action, plaintiff seeks to establish that Does 1-10 (public employees) created a dangerous condition of public property, pursuant to Cal. Gov't Code §840. This case has been pending for over two years. Plaintiff has never sought to amend that complaint to add a Doe Defendant. Given that trial is now set for April 14, 2008, it is simply too late to do so. For this additional reason, partial summary judgment should be granted as to the sixth cause of action.

G. Plaintiff's Claim For Dangerous Condition of Public Property Is Barred by The Affirmative Defense of Design Immunity.

Plaintiff's fifth and sixth causes of action allege that the underground station platforms and cars were in a dangerous condition at the time of plaintiff's accident because they lacked devices or systems to prevent, deter or warn individuals from inadvertently stepping off the platform between cars of BART trains, and detectable directional textured material on the platforms to help people find the doors to the cars. Even if the court somehow finds that plaintiff can meet the elements of §835. Plaintiff's statutory claim is barred by the affirmative defense of design immunity. Govt. Code section 830.6.

Design immunity is codified in Government Code, Section 830.6, which states that:

> Neither a public entity nor a public employee is liable under this chapter for an injury caused by the plan or design of a construction of, or an improvement to, public property where such plan or design has been approved in advance of the construction or improvement by the legislative body of the public entity or by some other body or employee exercising discretionary authority to give such approval or where such plan or design is prepared in conformity with standards previously so approved, if the trial or appellate court determines that there is any substantial evidence upon the basis of which (a) a reasonable public employee could have adopted the plan or design or the standards therefor or (b) a reasonable legislative body or other body or employee could have approved the plan or design or the standards therefor.

Cal. Gov't Code § 830.6.

The legislative purpose of the defense is stated by the California Law Revision Commission as follows:

> There should be immunity from liability for the plan or design of public construction and improvements where the plan or design has been approved by a governmental agency exercising discretionary authority, unless there is no reasonable basis for such approval. While it is proper to hold public entities liable for injuries caused by arbitrary abuses of discretionary authority in planning improvements, to permit reexamination in tort litigation by particular discretionary decisions where reasonable [persons] may differ on how the discretion should be exercised would create too great a danger of impolitic interference with the freedom of decision-making by those public officials to whom the function of making decisions has been vested.

4 Cal. Law Revision Com. Reports (1963), p. 823; see *Uyeno v. California* (1991) 234 Cal.App.3d 1371, 1376.

A public entity claiming design immunity must show the existence of three elements: (1) a causal

relationship between the plan and the accident; (2) discretionary approval of the plan prior to construction or subsequent improvement in conformity with those standards previously so approved; and (3) substantial evidence supporting the reasonableness of the design. In determining the third element, the Court is not concerned with whether the evidence of reasonableness is undisputed; the statute provides immunity when there is substantial evidence of reasonableness, even if contradicted. *See Grenier v. City of Irwindale*, (1997) 57 Cal.App.4th 931, 939 -940; *Bay Area Rapid Transit Dist. v. Superior Court* (1996) 46 Cal.App.4th 476, 481-82; and *Weinstein v. Cal. Dept. of Transp.* (2006) 139 Cal.App.4th 52, 58-59.

1. Causal Relationship.

BART asserts that it has immunity for design of its train cars and the design of the platform of the 16th Street & Mission station. A causal relationship between the plan and the accident, the first element required for a finding of design immunity, is generally established by showing that the alleged injury occurred as the result of the design. *Grenier v. City of Irwindale* (1997) 57 Cal.App.4th 931, 939-941; *see also Fuller v. Department of Transportation* (2001) 89 Cal. App. 4th 1109, 1114 [holding that a public entity may rely on plaintiff's pleading to establish a necessary element of causation.]. Here, the plaintiff claims that her injuries were the proximate result of the alleged dangerous condition. (Plaintiff's complaint, par. 10, 11 and 19.) Thus, the first element is established.

2. Discretionary Approval.

The second element, discretionary approval prior to construction, "simply means approval in advance of construction by the legislative body or officer exercising discretionary authority." *Ramirez v. City of Redondo Beach* (1987) 192 Cal.App.3d 515, 526. See, also *Thompson v. Glendale* (1976) 61 Cal.App.3d 378, 384, wherein Court held that the "employee exercising discretionary authority" under the terms of the statute need not be a licensed engineer, but merely an individual given responsibility for approving plans and designs.

As evidenced by the Executive Decision Document attached to the Declaration of Dick Wieczorak as Exhibit H, BART's Board authorized the General Manager to procure the subject C-2 transit vehicles. In addition, on March 17, 1992, the Board approved the award of the Contract to Morrison-Knudsen. As a result, there are no factual disputes as to the second element. Further, BART

had reputable engineering firms design the station platform at the 16th Street & Mission station. Outside engineers and BART itself approved the station platform design, signifying its reasonableness. (Declaration of Richard Wieczorek, par. 12 and Exhibit L.)

3. Substantial Evidence Supporting Reasonableness.

As previously indicated, in determining the third element, the Court is not concerned with whether the evidence of reasonableness is undisputed. The statute provides immunity when there is substantial evidence of reasonableness, even if that evidence is contradicted.

The California Supreme Court explains:

> "The third element of design immunity, the existence of substantial evidence supporting the reasonableness of the adoption of the plan or design, must be tried by the court, not the jury. Section 830.6 makes it quite clear that 'the trial or appellate court' is to determine whether 'there is any substantial evidence upon the basis of which (a) a reasonable public employee could have adopted the plan or design or the standards thereof or (b) a reasonable legislative body or other body or employee could have approved the plan or design or the standards therefor.'"

Cornette v. Department of Transportation (2001) 26 Cal.4th 63, 66.

The substantial reasonableness of design can be shown simply by a civil engineer's opinion of reasonableness or approval of the plan by competent professionals. *See Grenier,* 57 Cal.App.4th at 941. In *Grenier*, a California appeals court held that design immunity applied to a city drainage and flood control system in which a civil engineer designed the plan, a city engineer approved the plan, and an engineering expert deemed the design reasonable. As detailed below, the engineering and design approval process undertaken by BART is significantly more extensive and substantive than those approved by the courts in other contexts. *See Moritz v. City of Santa Clara* (1970) 8 Cal.App. 573 (finding that adherence to the Vehicle Code alone was sufficient as a basis for reasonableness); *Thompson v. Glendale*, (1976) 61 Cal.App.3d 378, 383-384.

In the present case, the initial specifications for the C2 transit vehicles were drafted by licensed BART engineers. The specifications were then distributed to various car builders for industry review. BART then retained outside transportation engineering consultants Booz-Allen & Hamilton to provide support for its negotiated procurement of the cars. Booz-Allen professionals reviewed the bid package and technical specifications. Potential car builders were contacted and the procurement documents were

finalized. (Declaration of Kolesar, par. 8.)

In August 1991, the related Contract Book - Technical Provisions for the Procurement of Transit Vehicles was placed out for bid. The Notice to Suppliers informed the potential suppliers that all the work was to be performed in accordance with the Laws of the State of California. Proposals were evaluated by a technical evaluation committee. The technical evaluation committee was assisted by outside consultants. The staff completed the evaluation of the best and final offers and determined that Morrison-Knudsen ranked the highest. (Declaration of Kolesar, par. 8.) Similarly, professional engineering firms designed and approved the station platform, indicating its' reasonableness. (Declaration of Wieczorek, par. 12 and Exhibit L.)

The substantial reasonableness of the C2- Cars design and the design of the 16th Street & Mission station platform is established by the approval of competent licensed engineering professionals both within and outside of the BART agency. (Declaration of Kolesar, par. 9 and Exhibit F; Declaration of Wieczorek, par. 12 and Exhibit L.) Accordingly, as a matter of law, BART is entitled to invoke design immunity as a bar to the plaintiff's cause of action for dangerous condition.

H. Plaintiff Cannot Establish That BART Has Violated Cal. Civil Code Sections 2100 and 2101.

In the fifth cause of action, a further State cause of action, Ms. Nash claims that BART violated Cal. Civil Code §§2100 and 2101. Under §2100, BART as a common carrier, has a duty of utmost care and diligence for a passenger's safe carriage. Under §2101, a carrier of persons for reward is bound to provide safe and fit vehicles.

In the present case, the evidence shows that there have been only two prior between car barrier accidents in the seven year period prior to the subject accident. During that time there had been over 600 million riders. This "safety" track record establishes that BART is safe. For this reason, plaintiff cannot establish common carrier liability in this case.

I. Plaintiff Is Not Entitled to Injunctive Relief as She Has Not Demonstrated Irreparable Injury.

Plaintiff seeks a permanent injunction against BART requiring it to install devices or systems to prevent, deter, or warn individuals from inadvertently stepping off the platform between cars and a

permanent injunction requiring BART to install detectable directional textured material, fully conforming to the State Architect's regulations, on its stations' platforms to help people who are blind find the doors to the cars.

The basis for injunctive relief has always been irreparable injury and the inadequacy of legal remedies. *Stanley v. University of So. Calif.* (9th Cir. 1994) 13 F.3d 1313, 1320. The equitable remedy of injunction is unavailable absent a showing of irreparable injury, a requirement that cannot be met where there is no showing of any real or immediate threat that the plaintiff will be injured again. *City of Los Angeles v. Lyons* (1983) 461 U.S. 95, 110.

In the *City of Los Angeles*, the plaintiff brought a civil rights action against the City seeking damages, injunctive relief and declaratory relief. The plaintiff alleged that he had been illegally choked into unconsciousness by the police during a routine traffic stop. The Court denied injunctive relief because the plaintiff did not establish a real an immediate threat that he would again be stopped for a traffic violation or for any other offense by an officer who would illegally choke him without any provocation or resistance on his part. *Id.*

A similar decision was reached in *Hodgers-Durgin v. De La Vina*, (9th Cir. 1999) 199 F.3d 1037, wherein two motorists who had been stopped by Border Patrol agents sought to maintain a class action against supervisory officials of the Border Patrol seeking declaratory and injunctive relief with respect to the pattern and practice of routinely stopping motorists without reasonable suspicion. The court determined that the motorists, who had been stopped only once in approximately ten years, did not establish a sufficient likelihood of future injury to warrant equitable relief. *Id.* at 1042-1045.

In *Proctor v. Prince George's Hospital Center* (1998) 32 F. Supp.2d 830, a former patient who was deaf sought declaratory judgment, injunctive relief, and damages against a hospital alleging violations of the ADA and Rehabilitation Act for failing to provide sign language interpreters. The District Court held that the patient was not entitled to injunctive relief under either Act, absent an actual or imminent threat to his rights.

In *Midgett v. Tri-County Metropolitan Transp. Dist. of Oregon,* (9th Cir. 2001) 254 F.3d 846, a bus passenger who used a wheelchair sought a permanent injunction compelling a transportation district's compliance with the ADA, plus compensatory and punitive damage. The transportation district

moved for summary judgment on the ADA claims. As evidence of the need for the requested measures, the plaintiff offered affidavits and declarations from himself and five other riders who used the lift services detailing problems they had experienced with the district's bus lifts over a period of time.

The Appellate Court determined that the passenger was not entitled to permanent injunctive relief under the ADA because he had not made a showing that he faced a real or immediate threat of substantial or irreparable injury. *Id.* at 850.

> Moreover, because the Plaintiff seeks to enjoin a government agency, "his case must contend with the well-established rule that the Government has traditionally been granted the widest latitude in the dispatch of its own internal affairs." *Rizzo v. Goode* 423 U.S. 362, 378-79, 96 S.Ct. 598, 46 L.Ed.2d 561 (1976) (citations and internal quotation marks omitted.). This "well-established rule" bars federal courts from interfering with non-federal government operations in the absence of facts showing an immediate threat of substantial injury. *Hodgers-Durgin*, 199 F.3d at 1042-43. In view of these standards, the district court did not abuse its discretion by denying Plaintiff's request for a permanent injunction.

Id. at 850. The Appellate Court held "it is clear that a plaintiff seeking an injunction against a local or state government must present facts showing a threat of immediate, irreparable harm before a federal court will intervene." *Midgett,* 254 F.3d at 851.

In *Thomas v. County of Los Angeles*, (9th Cir. 1992) 978 F.2d 504, the Court held that when a plaintiff seeks injunctive relief against a state public entity, the request must be weighed against concerns of equity, federalism and comity. In *Thomas*, the Ninth Circuit cautioned that a strong factual record showing that the misconduct flowed from a policy, plan, or a pervasive pattern, was necessary to support an injunction against a state agency. *Id.* at 508-509.

In the present case, plaintiff is requesting a permanent injunction against a multi-district public entity. However, she has not presented any facts showing a threat of immediate, irreparable harm. It is highly unlikely plaintiff will suffer the same injury, i.e., injuries caused as a result of falling between two BART cars. Ms. Nash has been aware of the proper way to utilize her cane in order to ensure she is entering a BART car at a location where a door is present for many years. She simply did not perform her normal routine on the day of the accident. In addition, over the past seven years, 600 million patrons, including visually impaired BART riders, have been able to enter the BART cars safely without falling between two cars. (Declaration of David Sanborn, paragraph 3.) Based on these facts, plaintiff

cannot demonstrate a likelihood of substantial and immediate irreparable injury. [4]

IV. CONCLUSION

For all of the reasons set forth above, defendant requests that summary judgment be granted. In the alternative, BART requests summary adjudication as to each and every cause of action.

Dated: February 14, 2008.

LOW, BALL & LYNCH

By _____
MARK F. HAZELWOOD
LAURA S. FLYNN
Attorneys for Defendant
BAY AREA RAPID TRANSIT DISTRICT

[4] In addition to the inability to establish immediate irreparable harm, plaintiff has not demonstrated that any potential harm cannot be redressed by a legal remedy as adequate compensatory monetary damages are available. *Sampson v. Murray* (1974) 415 U.S. 61, 90.